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October 4, 2001

BY FAX AND CERTIFIED MAIL, RETURN RECEIPT REQUESTED

D. Robert Lohn
Regional Administrator
National Marine Fisheries Service
7600 Sandpoint Way, NE
Seattle, WA 98115

Re: Delisting Petition

Dear Mr. Lohn:

I write on behalf of the Kitsap Alliance of Property Owners and the Skagit County Cattlemen's Association to petition, pursuant to 16 U.S.C. § 1533 and 50 C.F.R. § 424.14,¹ for the removal of two "species" of Pacific Northwest salmon from "threatened" status under the Endangered Species Act. The Alliance and Association also note that the Secretary is under a duty, pursuant to 16 U.S.C. § 1533(c), to "conduct, at least once every five years, a review of" all listed species to determine, among other things, "whether such species should be removed from the list".

With the largest salmon runs observed this year since dam counts began in 1938, the time is ripe for reconsidering application of the Endangered Species Act to Pacific salmon stocks, and the best scientific and commercial data that must be considered in connection with this delisting petition include substantial increases in the salmon runs identified below. See 50 C.F.R. § 424.11(d)(2).

This petition focuses upon the lawfulness of the listings under *Alsea Valley Alliance v. Evans*, No. 99-6265-HO (Sept. 10, 2001), and in particular the lawfulness of NMFS' treatment of hatchery fish. Judge Hogan's opinion establishes the following propositions of federal law:

- The National Marine Fisheries Service (NMFS) has determined "distinct population segments" (DPSs), the smallest units of fish and wildlife eligible for protection under

¹ Pursuant to 50 C.F.R. § 424.14(a), the undersigned states that he is an attorney for the Kitsap Alliance of Property Owners, P.O. Box 1861, Poulsbo, WA 98370 (360-779-9267) and the Skagit County Cattlemen's Association, 27589 Minkler Road, Sedro-Wooley, WA 98284 (360-856-6756).

the Act, through designation of "evolutionarily significant units" (ESUs). (Slip op. at 15.)

- NMFS may not protect DPSs smaller than the larger ESUs containing hatchery stocks, and may not include hatchery stocks within the ESUs, yet exclude them from the listings. (Slip op at 16-17.)
- NMFS may not redefine the ESUs to include only "natural"² stocks, omitting hatchery stocks, because hatchery and "natural" stocks are the same species and interbreed when mature, are not reproductively isolated in that they "share the same rivers, habitat and seasonal runs", because hatchery spawned salmon constitute very substantial portions of the ESUs, and because "NMFS considers progeny of hatchery fish that are born in the wild as 'naturally spawned'" and worthy of listing.³ The Alliance and the Association note that the United States Court of Appeals for the Ninth Circuit has previously acknowledged the "impossibility" of distinguishing "natural" from hatchery stocks.⁴
- NMFS does retain the option of broadening listing protections under the Act to include all "natural" and hatchery stocks within an ESU, to the extent that the best scientific and commercial data support the "threatened" or "endangered" risk status of the ESU *as a whole*. The Alliance and the Association doubt that such a case can be made.⁵

These propositions, applied to the "species" discussed below, establish that their listings were and are contrary to law. See 50 C.F.R. § 424.11(d)(3).

Puget Sound Chinook Salmon

NMFS March 24, 1999 Federal Register notice concluded that it had identified "38 hatchery stocks associated with the Puget Sound ESU of chinook salmon", and that "[a]fter reviewing the best available information regarding the relationship between hatchery and natural populations in this ESU, NMFS concludes that 36 hatchery stocks should be considered part of the ESU". 64 Fed. Reg. 14, 308, 14313-14 (Mar. 24, 1999). NMFS also noted that "the extensive transplanting of hatchery fish throughout the area makes identifying native, naturally self-sustaining runs difficult". (*Id.* at 14,319.)

² While Judge Hogan's opinion did not so hold, for most of the relevant "species", the very concept of "natural" stocks is itself arbitrary, capricious and contrary to law because salmon straying and hatchery operations have effectively eliminated any truly "natural" stocks.

³ Though Judge Hogan's observations on these factual points were directed to Oregon coastal coho salmon, as set forth below, the same observations apply to all the "species" subject to this petition.

⁴ *PNGC v. Brown*, 38 F.3d 1058, 1068 (9th Cir. 1994) ("it is impossible to enforce the [Endangered Species Act's prohibition against] trade and transport [of protected fish] . . .").

⁵ The Alliance and Association are informed that NMFS' own analyses of and methodologies for assessing extinction risk, when applied to ESUs as a whole, including hatchery stocks, show no appreciable risk of extinction for nearly all Pacific Northwest salmon ESUs.

Nevertheless, when NMFS listed the fish, it defined the class subject to protection as "threatened" as:

"Puget sound chinook salmon (*Oncorhynchus tshawytscha*). Includes all naturally spawned populations of chinook salmon from rivers and streams flowing into Puget Sound including the Straits of Juan De Fuca from the Elwha River eastward, including rivers and streams flowing into Hood Canal, South Sound, North Sound and the Strait of Georgia in Washington."

64 Fed. Reg. 14,308, 14,328 (Mar. 24, 1999).

As a matter of federal law, this listing is plainly unlawful because, among other things, NMFS has applied the Act's protections to less than the DPS/ESU it identified, by omitting at least 36 hatchery stocks.⁶ NMFS has also failed to assess risk to this ESU taking account of risks to hatchery populations.

Hood Canal Summer-Run Chum Salmon⁷

In its listing notice, NMFS identified the Hood Canal summer-run chum salmon ESU/DPS, declaring:

"... chum salmon from the following five hatchery programs should be considered part of the ESU: Quilcene National Fish Hatchery; Long Live the Kings Enhancement Project (Lilliwaup Creek); Hamma Hamma River Supplementation Project; and WDFW/Wild Olympic Salmon Cooperative (Dungeness River)." 64 Fed. Reg. 14,508, 14515 (Mar. 25, 1999).

However, when NMFS listed the fish subject to protection as "threatened", NMFS identified the class subject to protection as:

"Hood Canal summer-run chum salmon (*Oncorhynchus keta*). Includes all naturally-spawned populations of summer-run chum salmon in Hood Canal and its tributaries as well as populations in Olympic Peninsula rivers between Hood Canal and Dungeness Bay, Washington." *Id.* at 14,517.

As a matter of federal law, this listing is plainly unlawful because, among other things, NMFS has applied the Act's protections to less than the DPS/ESU it identified. NMFS has also failed to assess risk to this ESU taking account of risks to hatchery populations. Indeed, the listing decision acknowledges little risk to this ESU as a whole by remarking that in the event that natural runs were at a "high risk of extinction", NMFS might extend protection to the identified hatchery stocks.

⁶ There is a suggestion in the listing notice that five of the hatchery stocks identified as part of this ESU "should be listed", *id.* at 14,319, but they are not included in 50 C.F.R. § 223.102.

⁷ Only the Kitsap Alliance of Property Owners is seeking delisting of this "species".

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Conclusion

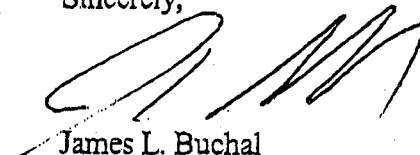
The federal government has no lawful role in selecting hatchery stocks of salmon for propagation or extermination within the Pacific Northwest. That role is Constitutionally charged to the Region's states and Native American Tribes. Indeed, the federal government can and should withdraw entirely from attempting to control Columbia Basin salmon management through the Endangered Species Act, restoring that role to the Region's states.

The federal government has far more pressing business than micromanagement of salmon recovery in the Pacific Northwest, and its unlawful extensions of federal authority in these and other areas threaten to turn the federal government into a jack of all trades, but master of none. We ask that you serve our Nation's interests by faithfully executing the law and removing these species from the list, as part of a necessary effort to redirect federal resources upon issues of genuinely national concern.

This letter also constitutes notice, pursuant to 16 U.S.C. § 1540(g), of the intent of the Alliance and Association to pursue any and all legal remedies available under the Act or otherwise to compel your faithful discharge of your duty to remove these "species" from the list. The Alliance and Association reserve the right to enter litigation to ensure appropriate and lawful actions on the part of NMFS.

Pursuant to 16 U.S.C. § 1533(b)(3)(A), you have ninety days to offer a substantive response to this petition for delisting.

Sincerely,



James L. Buchal

Copies by Certified Mail, Return Receipt Requested to:

Secretary of Commerce
Attorney General

Copies by Fax and First Class Mail to:

Governor Locke
Governor Kitzhaber
Governor Martz
Governor Kempthorne
Senator Murray
Senator Cantwell
Senator Smith
Senator Wyden

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Senator Baucus
Senator Burns
Senator Craig
Senator Crapo
Congressman Hastings
Congressman Nethercutt
Larry Cassidy, Chair, Northwest Power Planning Council